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SUBJECT: Labor Relations Guidance on Union Representation and the Departmental Drug Program

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This transmits the Department's final guidance with regard to union representation and the Departmental drug program. In reaching our conclusions, we applied 5 U.S.C. §7114(a)(2)(B) to each major distinct phase of the drug testing process.

However, given the varying circumstances and unique factual situations under which questions concerning union representation may arise, this guidance, by necessity, cannot completely address the issue. For example, not addressed in this guidance is the situation where a supervisor, contemplating issuing a reasonable suspicion drug testing notice, approaches an employee to question the employee about his or her erratic behavior. This meeting clearly constitutes an examination of an employee in connection with an investigation which the employee could reasonably believe might result in disciplinary action; and, thus, the right to union representation, upon request by the employee, would attach. In light of this, we recognize that the application of the right to union representation may differ from case to case. Because of this possibility, we advise you to contact the Labor and Employee Relations staff (M-17) at 366-9440 for further guidance when necessary.

Attachment

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LABOR RELATIONS GUIDANCE ON UNION REPRESENTATION
AND THE DEPARTMENTAL DRUG PROGRAM

I. Issue

At what stages, if any, of the Department's drug testing procedures does an employee's right to union representation under §7114(a)(2)(B) of the Federal Service Labor-Management Relations Act attach?

II. Conclusion

1. The issuance of drug testing notices per se does not give rise to union representation.

2. An employee undergoing any one of the seven types of drug testing authorized under DOT Order 3910.1 does not have a right to union representation during the specimen collection processing phase.

3. The actual collection of the urine sample itself does not give rise to union representation.

4. A meeting between the Medical Review Officer (MRO) and the employee gives rise to an employee's right to union representation upon request.

III. Background

Section 7114(a)(2) of the Act, 5 U.S.C. §§7101-7135 (1982), reads as follows:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at ....

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if:

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

The legislative history of §7114(a)(2)(B) discloses that it was enacted in response to the decision of the Supreme Court in National Labor Relations Board (NLRB) v. J. Weingarten, Inc., 420 U.S. 251 (1975) and intended to make the Weingarten right applicable to Federal employees. Congress sought to appropriate the general principles of Weingarten and allow those principles to

evolve in the unique and varying circumstances of Federal employment, not to hold those principles to the factual and procedural context of Weingarten. AFGE, Local 9141 v. FLRA, 837 F.2d 495 (D.C. Cir. 1988).

Six elements must be met before a statutory right to union representation vests in a Federal employee. There must be (1) an examination, (2) of an employee in the unit, (3) by a representative of the agency, (4) in connection with an investigation, (5) the employee reasonably believes that the examination may result in disciplinary action against the employee, and (6) the employee requests representation. Dept. of Treasury, IRS and NTEU, 15 FLRA No. 78 (1984).

The first element, an examination, involves questioning to secure information. NTEU v. FLRA, 835 F.2d 1446 (D.C. Cir. 1987). A meeting designed to ask questions, elicit additional information, have the employee admit his alleged wrongdoing, or explain his conduct is an examination. Dept. of Treasury, IRS and NTEU, supra.

Specifically, polygraph tests constitute examinations. Consolidated Casinos Corp., Sahara Division, 266 NLRB 988, 113 LRRM 1081 (1983). In Consolidated Casinos, the Administrative Law Judge noted that the test results were critically affected by what questions were asked of the examinee. The questions were not standard but were custom fitted to each examinee and resulted from prior dialogue between the examinee and examiner.

Conversely, "fitness for duty" examinations do not constitute examinations. U.S. Postal Service, 252 NLRB 61, 105 LRRM 1200 (1980). As described by the Administrative Law Judge, the "fitness for duty" examination was conducted by one of the employer's staff physicians and consisted of a "hands on" physical examination of the employee's anatomy, questions and discussion by the physician of the employee's medical and work history. The Board recognized that questions of an investigatory nature were not asked at these examinations, and, accordingly, the questions did not meet the tests set forth in the Weingarten line of cases which envision a confrontation between the employee and his or her employer.

Urinalysis tests are similar to "fitness for duty" examinations. No questions of an investigatory nature are asked. They are akin to a simple measurement process such as the taking of fingerprints or a blood sample. Consolidated Casinos, supra.

The second element, of an employee in the unit, is a factual issue and must be determined on a case-by-case basis. The third element, by a representative of the agency, is not limited to management representatives. In an extreme case, questioning of one Federal employee under disciplinary investigation by another nonmanagement Federal employee, at management's behest was found to be an examination. NTEU v. FLRA, supra. Although the question of whether the other employee was acting as a representative of the agency was not reached, the above finding provides sufficient rationale to conclude that Department consultants or contractors, with responsibilities for carrying out the Department's drug program, act as management representatives for purposes of the statutory right to union representation. See also DOD and AFGE, Local 2567, 28 FLRA No. 150 (1987).

The fourth element, in connection with an investigation, involves an examination designed and used by an agency as part of an investigative effort to obtain information which could lead to discipline. Dept. of Treasury, IRS and NTEU, supra. The fifth element, the employee reasonably believes that the examination may result in disciplinary action, entails analysis under a two-prong "reasonably believes" standard. The relevant inquiry is whether, in light of the external evidence, a reasonable person would decide that disciplinary action might result from the examination. This focus on the "objective" facts relating to the interview of an employee intertwines two distinct inquiries. The first inquiry looks to the conclusions that a hypothetical reasonable employee would draw from his or her own observation of the facts and circumstances surrounding the interview. The second inquiry equates the "reasonably believes" standard with the actual risk of discipline posed by the interview itself. AFGE, Local 2544 v. FLRA, 779 F.2d 719 (D.C. Cir. 1985) (as amended February 14, 1986).

The sixth and final element, the employee requests representation, requires a showing that the request was sufficient to put the employer on notice of the employee's desire for representation. Thus, an employee's mention that "maybe I need to see a union rep." without a clear and unmistakable waiver is sufficient to put an employer on notice that the employee has an interest in representation. DOJ, Bureau of Prisons and AFGE, Local 3148, 27 FLRA No. 97 (1987). Where an employee waives or withdraws the right to union participation, the employer does not fail to comply with §7114(a)(2)(B) of the Statute since a request for representation is a prerequisite to any obligation under that section of the

Statute. Army and Air Force Exchange Service and AFGE, Local 1345, 16 FLRA No. 109 (1984); DOJ, Bureau of Prisons and AFGE, Local 3696, 14 FLRA No. 59 (1984).

The proper role of a union representative at an investigatory interview is more than that of an observer. The representative must be able to speak freely on behalf of the employee. Nevertheless, the employer has a legitimate right in seeing that the interview does not become an adversarial contest of wills between the agency representative and union representative. A reasonableness standard is employed here. Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, 9 FLRA No. 55 (1982). The union representative cannot be told to remain silent. Some interruption, by way of comments regarding the form of questions or statements as to possible infringement of employee rights, should properly be expected from the union representative. The employer always retains the option to terminate the examination and report the facts without the benefit of employee input. U.S. Customs Service, Region VII, Los Angeles, California and NTEU, 5 FLRA No. 41 (1981).

Once an employee requests a legitimate right to union representation, the employer must make a good faith effort to locate a union representative. If none is available and management has either delayed the examination for a reasonable period of time or time is of the essence, management has a legitimate right to proceed with the test in absence of a union representative. Federal Prison System and AFGE, Local 2052, 25 FLRA No. 16 (1987); Coca-Cola Bottling Co. of Los Angeles, 227 NLRB 1276, 94 LRRM 1200 (1977). Reasonableness for purposes of delay must be determined on a case-by-case basis depending on the particular facts of a case. Federal Prison System and AFGE, Local 2052, supra. Time has been found to be of the essence in a case whereby an employee, who was acting abnormal, was asked to undergo a medical evaluation for possible use of drugs or alcohol. Meharry Medical College, 236 NLRB 1396, 99 LRRM 1002 (1978).

IV. Analysis

A. Phase I - Issuance of Notices

Pursuant to DOT Order 3910.1, "Drug-Free Departmental Workplace," dated June 29, 1987, the Department's drug testing program consists of seven different types of testing - random, periodic, reasonable suspicion, pre-employment/pre-appointment, accident

or unsafe practice, voluntary, and follow-up testing. Each employee subject to random testing was provided a specific written notice by his or her supervisor at least 30 days before testing began.[1] Each employee subject to reasonable suspicion testing, post accident testing, follow-up testing, or who requests voluntary testing is provided a written notice by his or her supervisor prior to testing.[2] In addition, those Federal Aviation Administration employees subject to periodic testing were provided notice outside the confines of the Department's drug testing program.

The issuance of drug testing notices does not give rise to union representation because the brief encounter between supervisor and employee does not constitute an examination. The meeting is not designed to ask questions, elicit additional information, have the employee admit alleged wrongdoing or explain conduct. Rather, it is analogous to the factual situation presented in Dept. of Treasury, IRS and NTEU, supra, which held that even where an

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[1] The notice contained: (1) the reason for the program, (2) assurance that the quality of testing procedures is tightly controlled, that the test used to confirm use of illegal drugs is highly reliable and that test results will be handled with maximum respect for individual confidentiality, (3) notice of opportunity for submitting supplemental documentation that may support a legitimate use for a specific drug, (4) the consequences of a confirmed positive result or refusal to be tested including disciplinary action, and (5) the availability of drug abuse counseling and referral services including the name and telephone number of the local Employee Assistance Program Coordinator.

[2] These notices contain the same information as is contained in the specific random testing notices except, rather than giving the reason for the program, they provide the reasons for the tests. Follow-up testing notices do not contain information regarding the availability of counseling for obvious purposes.

employee was issued a warning and informed just to listen and acknowledge that he understood what was being said, no examination occurred. Because the requisite finding of an examination is not present, discussion concerning application of the five remaining elements is unnecessary.

In addition to written notification, verbal notification in the cases of random, voluntary and follow-up testing is provided by the supervisor to employee approximately 15 - 30 minutes prior to actual collection. For the same reasons outlined above, the issuance of verbal notices, likewise, does not give rise to union representation.

However, in accordance with established past practice, negotiated agreement or standard operating procedure, employees are not precluded from seeking out their union representatives for advice, on their own, between the time they are served with written and/or verbal notices and the time they are scheduled to appear at the collection site so long as collection is not delayed and time is not of the essence. The employee's right to union representation is not at issue in this case inasmuch as there is no encounter between management and the employee to trigger the statutory right.

Although not considered an independent drug testing phase for analysis purposes, a situation could arise whereby the employee fails to report to the collection site or refuses or fails to provide a specimen. When an employee fails to report, the collector immediately notifies the Drug Program Coordinator (DPC)/Site Coordinator, who in turn immediately contacts the employee's supervisor. The supervisor discusses with the employee the reasons for failing to appear. If the employee does not provide legitimate reasons, the supervisor documents such and initiates appropriate disciplinary action.

When an employee refuses to provide a specimen, the supervisor must document all relevant details to support any disciplinary action including the employee's reasons. Lastly, when an employee fails to provide a specimen after a second attempted collection, the MRO, upon receipt of his/her copy of the chain of custody form, contacts the employee for any medical justification that may exist to explain why the employee failed to provide a specimen. If the MRO believes there is no medical basis, he/she notifies the DPC who in turn contacts the employee's supervisor who must initiate disciplinary action.

These encounters between supervisor and employee and MRO and employee are classic Section 7114(a)(2)(B) situations giving rise to union representation rights. They present investigatory interviews which the employee could reasonably believe might result in disciplinary action.

B. Phase II - Specimen Collection Processing

Once an employee is informed that he or she has been selected for drug testing and reports for testing, he or she is greeted by the Department's collection contractor who explains the collection process and asks the employee to fill out a chain of custody form which serves as an identification document for the urine sample.

An employee undergoing any of the seven types of drug testing under the DOT program does not have a right to union representation during the specimen collection processing phase. The specimen collection processing phase does not involve an examination. It only seeks identification information for chain of custody purposes. Since the requisite finding of an examination is not present, analysis of the five remaining elements necessary to invoke the statutory right to union representation is unnecessary.

C. Phase III - Collection

The employee follows the collection process and provides a urine sample as explained by the Department's collection contractor during the employee processing phase. Here, actual collection of the sample itself, regardless of the type of testing, does not give rise to union representation for the same reason enunciated in Phases I and II. Moreover, this approach comports with the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Guidelines) promulgated by the Department of Health and Human Services, 53 Fed. Reg. 11970 (1988). Among other things, the HHS Guidelines mandate that no unauthorized personnel shall be permitted in any part of the designated collection site when urine specimens are collected or stored.

D. Phase IV - MRO's Examination

HHS Guidelines require the drug testing laboratory to transmit test results directly to the Department's MRO. The role of the MRO is to review and

verify positive test results by examining alternative medical explanations for such positive test results. The action could include conducting employee medical interviews. The MRO, like the collection contractor, is a representative of the agency.

A meeting between the MRO and the employee gives rise to an employee's right to union representation upon request. This conclusion applies whether the meeting takes place by telephone conversation or face-to-face interview. NTEU v. FLRA, supra. A medical interview seeking alternative medical explanations for a positive test finding results in questioning during an inquiry in search for the truth or an examination. AFGE, Local 1941 v. FLRA, supra.

The MRO interview can be characterized as part of an investigative effort to obtain information which could lead to discipline. Finally, the employee may reasonably believe that the examination may ultimately lead to disciplinary action against him or her. Indeed, after verification of confirmed positive test results by the MRO, a DPC notifies the appropriate management officials to initiate appropriate disciplinary action.

V. FLRA Guidance

The conclusions reached in this guidance are consistent with the FLRA's advice rendered in Air Force Flight Test Center (AFFTC/U.S. Army), Edwards Air Force Base, California, Case Nos. 8-CA-70401, 70402, 70403-1 and 70403-2, FLRA General Counsel, Advice Memorandum dated August 17, 1987, which found that §7114(a)(2)(B) was inapplicable to representation at any phase of a drug testing program. The phases considered included the computer selection run; the delivery of testing notices to employees; pretesting, i.e., gathering of equipment and sample bottles; actual testing whereby the union representative stood outside the door while the employee gave the sample; and post-testing, i.e., sealing the samples in boxes and mailing to the laboratory via Federal Express.

The FLRA General Counsel reasoned that the phases did not give rise to examinations or investigatory interviews because they were analogous to a fitness for duty physical examination by a medical doctor to ascertain the physical status of an employee through the application of professional medical techniques and

lacked any confrontational aspect. In addition, the FLRA General Counsel opined that there was an absence of a reasonable fear of discipline on the part of the employee involved.

However, the FLRA General Counsel viewed issues regarding union representation throughout the various stages of the drug testing program as conditions of employment which the union could bargain over as impact items. Thus, while §7114(a)(2)(B), as a statutory right, does not grant employees, upon request, the right to union representation at the various phases of drug testing with the exception of the MRO examination, the right to union representation during this process, as with many other management-initiated actions, is a matter subject to negotiation.